

## “Africa fund” case F.A.Q.

### → What is the “Africa Fund” and what is its purpose?

With Budget Law 232/2016, the Italian Parliament earmarked 200 million Euros to create the so-called “Africa Fund” for the fiscal year 2017. This expenditure was again foreseen in the 2017 and 2018 Budget Laws.

### → What is the declared purpose of the “Africa Fund”?

“Africa Fund”'s declared purpose is to finance "extraordinary measures" to “**promote dialogue and cooperation with key African partners on migration**”. One of these partners is Libya, along with Tunisia and Niger.

### → What exactly did ASGI challenge in Court?

ASGI challenged the **lawfulness of the Ministry of Foreign Affairs (MFA) Decree no. 4110 of 2017**, allocating 2,5 million Euros for the Italian Ministry of Interior (MOI) to provide “*technical support by the Italian Ministry of Interior to the competent Libyan authorities to improve border and migration management, including combating migrants smuggling and search and rescue activities*”

ASGI also challenged the lawfulness of the **memorandum between the Italian MFA and MOI**, pursuant to which the MFA issued Ministerial Decree 4110 of 2017.

### → What were the EUR 2,5 MLN allocated by Decree 4110 used for?

The money was entirely spent on supporting the operational capability of the Libyan authorities, more precisely:

- Restoring four patrol vessels of the LCG;
- Purchasing spare parts for the vessels;
- Towing one of the vessels from Tripoli to the Bizerte port in Tunisia;
- Training 33 members of the LCG crew;
- Insurance and certificates.

### → What are the violations alleged by ASGI in its lawsuits?

**1. Misuse of power:** this violation occurs when an administrative act intended to pursue a public goal is used for another purpose instead. The consequence is that the act can be declared void and annulled (art. 21-octies, law 241 of 1990). In this case, ASGI claims that “*technical support by the Italian Ministry of Interior to the competent Libyan authorities to improve border and migration management*” through measures clearly aimed at improving the operational capability of the LCG's to pull migrants back into Libya, is in no way in line with the intended purpose of the “Africa Fund”, i.e. “*promoting dialogue and cooperation with African partners on migration*”.

ASGI argues that dialogue and cooperation can only be promoted in accordance with respect for fundamental human rights. On the contrary, the actions financed by Decree 4110 will

- (a) increase the LCG's capacity to pull back migrants into Libya where they will be subjected to gross human rights violations in detention centres;
- (b) assist operations of the LCG, which in the past has already used force against migrants and international organizations personnel, including by opening fire against vessels operated by MSF in 2016 and *Proactiva Open Arms* in 2017, and flogging migrants during a "rescue" operation in 2018;
- (c) exacerbate the hostilities among warring parties, since the patrol vessels can also be employed for military purposes.

**2. Violation of the Italian Constitution through violation of Articles 2 and 3 of the ECHR:** ASGI also moved the Administrative Court to raise with the Italian Constitutional Court the issue of constitutionality of Decree 4110, because it violates fundamental human rights, and notably Articles 2 and 3 of the ECHR. By improving the LCG's operational capacity to pull back fleeing migrants into Libya, the Italian government directly contributes to exposing such persons to the risk of being subjected to gross human rights violations that are widespread practice in Libya. The unspoken purpose of the law is to contribute to migration control through a system of pull back by proxy into Libyan territory and detention of migrants in camps. *De facto*, this equates direct push back into Libya, already condemned by the ECtHR in the 2012 *Hirsi Jamaa et al.* judgment.

### **→ What were the Italian Government's defense lines?**

The Italian Government actively fought back ASGI's claims, alleging that

- The impugned act had a political nature and thus could not be challenged in Court;
- The challenged expenditures were in line with the purported objectives of the "Africa Fund";
- In no way the equipment provided can be used for military purposes;

Moreover, in its recent response to ASGI's appeal, the Government stated that the operational support to the Libyan authorities, far from contributing to violations of migrants' fundamental rights, was in fact part of a broader strategy to curb exploitation of migrants, complementing the activities carried out on the ground by agencies such as UNHCR and IOM.

### **→ What is ASGI's position on this last point?**

ASGI believes that the Italian Government's claim that reinforcing sea border controls in Libya is in fact a protection measure for migrants is simply preposterous. All the most influential human rights organizations (including the Council of Europe, the UN's High Commissioner for Human Rights, and the UN Committee against Torture) documented and publicly denounced the horrendous human rights violations endured by migrants in Libya after being rescued at sea.

Recent reports by UNHCR and IOM, far from praising border control operations as part of a protection strategy of vulnerable migrants, clearly indicate that Libya cannot be considered as a "Place of Safety" and any push-back or pull-back of migrants into Libya would amount to a violation of the *non-refoulement* principle.

Italy's actions therefore willfully contributed to this system of gross human rights violations by the Libyan authorities.

**→ What arguments did ECRE, the ICJ, Amnesty international and Differenza Donna raise in their third-party interventions?**

ECRE and the International Commission of Jurists (ICJ) made a joint third-party intervention on 6 July 2018 in support of ASGI's lawsuit. Their main arguments rely on the alleged responsibility of the Italian Government based on the Draft Articles of the International Law Commission on State responsibility.

More precisely, ECRE and the ICJ argued that Italy is responsible under Draft Article 16 (which enshrines a norm of international customary law according to the International Court of Justice) for knowingly giving a contribution to actions attributable to the Libyan Government violating fundamental human rights of migrants.

Italy is also allegedly responsible under Draft Article 41 for violating the general obligation under international law to refrain from acts contributing to violations of *jus cogens* norms (such as prohibition of torture, enslavement, forced labour) and help prevent their commission.

*Amnesty International* filed a third-party intervention in support of ASGI's claim on 4 September 2018) stressing the importance, in order to assess the lawfulness of Decree 4110, to analyze it within the broader context of the Italy-Libya relations.

To this end, of particular importance is the 2017 Memorandum of Understanding between Italy and Libya, and other measures such as the donation of 12 vessels to the LCG in June 2018.

The act is clearly aimed at reinforcing capacity of bodies (such as LCG and the General Administration for Coastal Security) that are known for perpetrating human rights violations.

The Italian government willfully contributed to such actions, as also demonstrated by the fact that they did not place any restrictions or require any reassurances that equipment would be used for acts contrary to international law.

The fact that Italy also contributed to relief projects through the "Africa Fund" is irrelevant.

*Differenza Donna* highlighted that reinforcing the operational capacity of the Libyan authorities also contributes to exposing women to the risk of becoming (or remaining) victims of trafficking in human beings (THB). States have an obligation to ensure that no legal or judicial measure contributes to violating women's fundamental rights and therefore constitute an infringement of Italy's international obligations under international law, including the Convention for the Elimination of Discrimination against Women, the 2011 EU Directive on prevention and repression of THB, and the EU Charter on human rights.

